IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH NAGPUR

Second Appeal No.19/2006

Office Notes, Memoranda of Coram, appearances, Court's orders or directions and Registrar's orders. : Court's or Judge's orders

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CORAM : A.P. Lavande, J.
Dated : September 21, 2006

Heard Mr. Bhattad, learned counsel for the appellant. The respondents though served are absent.

This second appeal is directed against judgment and decree dated 4th October 2005 passed by Fourth Adhoc District Judge, Bhandara in Regular Civil Appeal No. 39/2004 filed by the appellant against judgment and decree dated 6th February, 2004 passed by Civil Judge, Senior Division, Buldana in Regular Civil Suit No.26/1998.

The appellant is the original defendant no.1 and respondent nos. 2 to 3 are original defendant nos. 2 to 3. The above suit was filed by respondent no.1. The suit was filed by the respondent no.1 claiming declaration that she

was legally wedded wife of deceased Madhukar Ganvir and her daughters Pournima and Priti were legal heirs of deceased Madhukar. The plaintiff married Madhukar on 8.5.1991 and out of wedlock, two daughters Pournima and the plaintiff were born. Madhukar who was serving in Minor Irrigation Department, Zilla Parishad, Bhandara, Sub Division, Sakoli died on 28.6.1993 while on duty. The suit filed by the plaintiff was contested and it was the case of defendant no.1 that there was a customary divorce in the year 1984 between the plaintiff Pushpa and Madhukar. After appreciating the evidence led by the parties, the trial Court decreed the suit. The trial Court held that the defendant had not led any evidence to prove custom of divorce by leading cogent evidence. The appellate Court concurred with the findings given by the trial Court and consequently dismissed the appeal.

Mr. Bhattad, learned counsel for the appellant submitted that both the Courts below have totally ignored the evidence led by defendant no.1 as well as admissions in the

testimonies of the witnesses examined by the plaintiff. According to learned counsel, the appellant-defendant no.1 has clearly established custom of divorce and has also proved factum of customary divorce between the plaintiff and deceased in the year 1984. He further submitted that the trial Court as well as appellate Court wrongly discarded the evidence led by defendant no.1 in support of customary divorce. In support of his submissions, learned counsel relied upon the judgments of the Apex Court in Yamanaji H. Jadhav V. Nirmala (AIR 2002 Supreme Court 971) and Balwinder Singh Vs. Smt. Gurpal Kaur (AIR 1985 Delhi 14).

I have considered the submissions made by learned counsel for the appellant and perused records. I have also perused judgments relied upon by learned counsel for the appellant.

Since learned counsel claims that both the Courts below have wrongly held that the appellant has not proved customary divorce, it would be appropriate to find out if such a plea has been taken by defendant no.1 in her

written statement. Perusal of the written statement filed by defendant no.1 discloses that defendant no.1 had not specifically pleaded that such a custom in her written statement but had made reference to customary divorce between the plaintiff and deceased Madhukar. Therefore, the ratio laid down by the Apex Court in Yamanaji' case is squarely applicable in the present case. In the said case, the Apex Court has held that such a custom being an exception to general law of divorce, ought to have been pleaded and established by party propounding such custom. In the absence any pleading in the written statement filed by defendant no.1, it is difficult to accept the submission made on behalf of the appellant. In any event, both the Courts below upon appreciation of the evidence have held that as a matter of fact, defendant no.1 had not proved customary divorce between the parties. In my opinion, this finding cannot be termed as perverse having regard to the nature of the evidence led by the parties and since the finding cannot be said to be perverse, no

interference is called for in exercise of jurisdiction under Section 100 of the Code of Civil Procedure which jurisdiction is very limited as has been held by the Apex Court in catena of decisions. I am of the opinion that the judgment in Yamanji's case in stead of supporting the case of the appellant supports the case set up by the plaintiff. Insofar as the ratio laid down in Balwinder Singh's case (supra) the same is not applicable having regard to the fact that both the Courts below have come to the correct conclusion that the evidence led by the parties was not sufficient to establish the customary divorce.

In view of the above, I do not find any perversity in the findings given by both the Courts below. In any event, no substantial question of law is involved in the appeal. Therefore, the appeal is summarily rejected with no order as to costs.

JUDGE

A.